

GUIDELINES FOR TITLING ASSETS TO IMPLEMENT AN ESTATE PLAN



This article is intended provide a general framework for titling assets to accomplish a client’s estate planning goals. As is the case with any sound planning, estate planning is a cooperative effort that takes into account the client’s goals, their needs, and the benefits and risks of certain choices. For this reason this article is not meant to be responsive to all situations for all clients.

TYPES OF OWNERSHIP

Ownership of assets can be characterized as “**probate**” or “**non-probate**”. Those assets characterized as probate assets will be transferred to the appropriate beneficiary upon an individual’s death pursuant to such individual’s Last Will and Testament, or by the laws of intestate succession. These probate assets will be administered through the probate court and will be distributed to the beneficiaries, after payment of all appropriate debts, claims and administration expenses. Non-probate assets, on the other hand, will be distributed to particular or named beneficiaries outside of the probate process. The types of ownership which will ultimately determine whether an asset is probate or non-probate is better described below.

Probate: Generally, an asset will be a probate asset if upon review of the “title” to the asset, it cannot be ascertained how the asset is disposed upon death.

Individual: An asset which identifies one individual owner, without any beneficiary designated in the title, is a probate asset. For example, an asset in the name of “John Doe”, with no other designation or ownership structure is an individually owned asset, and therefore must be administered through the probate process.

Tenants in common: Assets held in “tenants in common” are also probate assets. These assets are held in common with other individuals and the title does not have “survivorship” language. Thus, the undivided one-half interest requires probate administration to ultimately be distributed to the survivors of the decedent.

Miscellaneous: Even though an asset has a joint tenant or beneficiary designated with the title to asset, if that joint tenant or beneficiary is deceased, and no other tenant or beneficiary is

included in the title, then the asset may require administration through the probate process. A typical example may include US savings bonds held by husband and wife, jointly with rights of survivorship. One of the spouses passed away, and the surviving spouse failed to change the title to the asset after the first spouse's death. Upon the surviving spouse's death, even though the asset was titled jointly with rights of survivorship, the bond will need to pass through the probate process since the joint tenant pre-deceased the decedent.

Non-Probate: Conversely with probate ownership, non-probate assets include or identify another individual who will receive title to the asset upon the death of the primary or co-owner.

JTWROS (Joint tenants with Rights of Survivorship): Many assets titled jointly are owned with rights of survivorship. The limited exception is the asset owned jointly as tenants in common, described above. JTWROS is typically the most common form of ownership held by spouses. Survivorship ownership can include almost any type of asset, whether real estate, bank accounts, automobile title, etc. With this ownership, however, the title holders have "ownership" interest in the asset, and therefore often have the ability to change, withdraw, encumber, or otherwise dispose of this asset. Also, with joint ownership the creditors of either owner can seek to access the assets.

TOD/POD: ("Transfer on Death" or "Payable on Death"): TOD and POD ownership have become a very common method of ownership and probate avoidance technique. Essentially, title to the asset is maintained by an individual, with a beneficiary or beneficiaries identified in the title, to be transferred upon the individual owner's death. Unlike survivorship ownership, the beneficiary of a TOD or POD has no current ownership rights. A sometimes problematic aspect of this type of ownership occurs when a designated beneficiary predeceases the owner. In such a situation, the distribution lapses, unless an alternate beneficiary is identified. For example, if a widow has a POD bank account identifying her three children as beneficiaries, and if one of those three children predecease the widow, then the surviving two children will receive the asset equally, and the children of the deceased third child will not receive anything. Therefore, it is very important that if TOD or POD ownership is utilized, the individual owner changes the beneficiary designation in the event any other named beneficiary predeceases the owner.

Beneficiary Designation: Various assets by their nature, require the owner to identify a beneficiary to receive the asset upon the owner's death. Common examples of this ownership include life insurance, individual retirement accounts (IRA), annuities, 401(k) plans, etc. It is very critical that not only a primary beneficiary be named, but an alternate or secondary beneficiary be included on the beneficiary designation form of the asset. Keep in mind that if the primary beneficiary predeceases the owner, and no alternate beneficiary is listed, then the asset may require probate administration to ultimately pass to the beneficiaries.

Trust: Assets which are specifically transferred to a trust, by ownership in a "trustee" will also avoid the probate process. Title to the asset must specifically identify the trustee and often require additional information in the title, such as the name of the trust and/or the date of the trust. The mere existence of the trust will not cause the assets to avoid probate. Assets must



be transferred to the trustee in order to pass outside of probate. Typically when a trust is created, the terms of an individual's Will provides for distributions to the trust ("Pourover" Will), but this contemplates the transfer of assets through the probate process to the trust. Trusts can be unfunded while living, and funded upon death with TOD or POD designations, or the utilization of beneficiary designations with other assets.

TITLING SPECIFIC TYPES OF ASSETS

Real Estate: Real estate can be owned by a variety of structures including individually, as tenants in common (ie, undivided one-half interest), JTWROS, TOD – caveats (see above), or a Trust. Typically the most advantageous ownership of real estate is in a Trust.

Bank accounts: Accounts held by financial institutions can be held individually, as JTWROS, POD, or in a Trust. Typically bank accounts should be held in a Trust as opposed to joint ownership (with a child, for example).

Stocks: All stocks whether held in street name or by certificate, should be identified. Additionally, de-mutualized insurance companies are often assets held individually and subject to probate administration. Frequently, shares of stock of de-mutualized companies (for example, Metropolitan Life) are distributed to a policy holder, and held in an account by the insurance company. Typically stock should be held in a Trust.

Bonds: Savings bonds (E, EE and H) - When ascertaining the value of this asset, also be sure to identify accrued interest, of which no income tax has been paid. Also, be aware of matured bonds which no longer pay interest. Typically bonds should be held in a Trust.

Brokerage accounts: Most brokerage firms allow for ownership to be held jointly with rights of survivorship, with a transfer on death beneficiary designation (TOD). So, a married couple can own a brokerage account jointly with rights of survivorship, with transfer on death beneficiary designations to their children. This ownership structure, of course, avoids the possibility of the probate estate upon the simultaneous death of the joint owners. Preferable to this approach is titling the account in a Trust or naming the Trust as the beneficiary under the transfer on death designation.

Life Insurance:

Beneficiary designation – As indicated above, be sure to identify both a primary and alternate beneficiary for all life insurance policies. Usually spouses will name each other as primary beneficiaries with the children as contingent beneficiaries.

Insured/Owner – Also be aware of the appropriate owner and/or insured. Often times a parent may be an owner of a life insurance policy naming their children as the insured. This may be considered a probate asset of the parent upon his or her death, so that the policy may require



probating through the deceased owner's estate.

IRA, Annuities, 401(k), etc.: A beneficiary designation is a very important consideration with this asset. An individual with a spouse should generally identify the spouse as the primary beneficiary, so that the spouse will be permitted to continue to defer federal income recognition through the use of a spousal rollover. A non-spouse beneficiary may be able to elect to take the proceeds from the account in installments based upon the beneficiary's life expectancy, and thereby spreading the income tax recognition over many years. If a non-spouse is intended to be identified as a beneficiary and the owner is currently married, the spouse generally must consent or sign the beneficiary designation form. Usually spouses will name each other as primary beneficiaries with their children as contingent beneficiaries.

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